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Supreme Court, U.S.
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90-1405

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA

PETITIONER,

V.

JOE LOUIS HARRELL

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

OF

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AND

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STATEMENT OF QUESTIONS PRESENTED

A. Is substantial under-representation of the relevant minority on the petit jury an essential element in the establishment of a prima facie case of racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986)?

B. Where the relevant minority comprises 31.5% of the population of a county and the same minority comprises 35.7% of a venire drawn from such county and the same minority comprises 41.7% of a petit jury struck from such venire, is a finding of racial discrimination in the striking of such petit jury clearly wrong, where the prosecution struck substantial numbers of all racial groups?

THE PARTIES

The parties in all of the lower courts were the same as those in this proceeding, the same being set out in the caption.

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NO. _____

IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1990

STATE OF ALABAMA,

PETITIONER,

V.

JOE LOUIS HARRELL,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

OPINIONS AND ORDERS BELOW

The Circuit Court of Mobile County, Alabama, issued no formal order in overruling the Respondent's Batson[1] objection at the time of trial.

The opinion and order of the Court of Criminal Appeals of Alabama affirming

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[1]Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).

the Respondent's conviction on original submission are reported as follows:

> Harrell v. State, 555 So.2d 257, 258-262 (Ala. Crim. App. 1989)

A copy of the same is submitted in Appendix "A" hereto.

The opinion and orders of the Court of Criminal Appeals on rehearing, remanding the cause with directions and denying rehearing are reported as follows:

> Harrell v. State, 555 So.2d 257, 262 (Ala. Crim. App. 1989)

A copy of the same is submitted in Appendix "A" hereto.

The opinion and order of the Supreme Court of Alabama affirming the order of the Court of Criminal Appeals is reported as follows:

> Ex parte State: Re: Harrell v. State, 555 So.2d 263 (Ala. 1989)

a copy of the same is submitted as Appendix "B" hereto.

The order of the Circuit Court of Mobile County on remand will not be reported, but a copy of the same is submitted as Appendix "C" hereto.

The opinion and order of the Court of Criminal Appeals of Alabama reversing the Respondent's conviction, remanding the cause and denying rehearing are not yet reported, but will be reported as:

> Harrell v. State, ___ So.2d ___ (Ala. Crim. App. April 27, 1990)

A copy of the same is submitted as Appendix "D" hereto.

The opinion and order of the Supreme Court of Alabama, quashing the writ of certiorari as improvidently granted are not yet reported, but will be reported as follows:

> Ex parte State: Re: Harrell v. State,

____ So.2d ___ (Ala, Nov. 30, 1990)

A copy of the same is submitted as Appendix "E" hereto.

The order of the Alabama Supreme Court declining to stay its order pending review by this Honorable Court will not be reported but a copy of the same is submitted as Appendix "F", hereto.

JURISDICTION

The order of the Supreme Court of Alabama was issued on November 30, 1990, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Courts of the State Alabama, believed that their decisions were mandated by the Section 1 of the

Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provision reads:

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. Respondent was indicted under Sections 13A-12-212

and 214, Code of Alabama, 1975, and the jury was selected pursuant to Section 12-16-100 of the same Code. Copies of these statutes are submitted in Appendix "G" hereto.

STATEMENT OF THE CASE

The Court of Criminal Appeals stated the case up to appeal generally, as follows:

> "Joe Louis Harrell was convicted for the unlawful possession of cocaine in violation of Ala. Code 1975, §13A-12-212,[2] and sentenced to 30 years' imprisonment. He was also convicted of possession of marijuana in the second degree in violation of Ala. Code 1975, §13A-12-214,[3] and sentenced to six months' imprisonment. Harrell raises six issues on this appeal from those convictions...."

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[2] Appendix "G"

[3] Ibid.

(Harrell v. State, 555 So.2d 257, 258 [Ala. Crim. App. 1989]; hereinafter referred to as "Harrell I"; Appendix "A", page 1-2)

On rehearing, the Court of Appeals stated the case as to Respondent Harrell's Batson[4] claim as follows:

> "...The supplemental record shows that the prosecution used five of its eight peremptory challenges to remove blacks from the jury venire and that the jury was composed of seven whites and five blacks. The trial judge denied the Batson objection at a side bar conference held off the record after defense counsel argued his objection and the prosecutor explained the reasons for here peremptory strikes after the trial judge had absented himself from the proceedings. ..." (Harrell I, 555 So.2d 257, 262; Appendix "A", page 20, emphasis supplied)

On original submission, the Petitioner State argued (1) that the Trial

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[4]Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986)

Judge's absenting himself from the proceedings during the Batson argument implied a finding that the lack of a prima facie case under Batson was too obvious to merit discussion and (2) that such ruling could not be reviewed because of the insufficiency of the record.

On March 31, 1989, the Court of Criminal Appeals affirmed Respondent Harrell's conviction, finding, inter alia, that his Batson objection was not timely. (Harrell I, 555 So.2d 257, 258-259, Appendix "A", pages 2-6) The Petitioner State had advanced no such claim.

Respondent Harrell then applied for rehearing and moved to supplement the record. On May 12, 19989, the Court of Criminal Appeals granted rehearing and, ignoring the question of prima facie showing of racial discrimination, remanded the cause for a determination of racial

neutrality of the Prosecutors' reasons for their strikes of black venirepersons. (Appendix A,pages 20-21)

The Petitioner State applied for rehearing pointing out: (1) The necessity of a prima facie showing of racial discrimination, before the prosecutor is required to explain his or her strikes, (2) that the Trial Judge had made an implied finding that no prima facie case had been made out, and (3) that such finding was correct because the Prosecutors struck both blacks and whites and the jury which sat on the Respondent's case did not reflect substantial underrepresentation of black persons. On June 16, 1989, the Court of Criminal Appeals denied the Petitioner State's application for rehearing. (Harrell I, Appendix "A")

The Petitioner State petitioned the Alabama Supreme Court for certiorari

review, raising the points it had raised on rehearing. Review was granted, but on November 9, 1989, the Alabama Supreme Court affirmed the Court of Appeals' decision. The Alabama Supreme Court agreed with the Respondent State on the necessity of there being a prima facie finding of racial discrimination and that the Trial Judge had made such a finding. (Harrell v. State, 555 So.2d 263, 265 [Ala, 19899]; hereinafter Harrell II; Appendix "B", page 28)[5] The Alabama Supreme Court did not address the issue of substantial under-representation but remanded the cause for a determination of prima facie case and whether the

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[5] "...As the record indicates, the trial judge took no part in the exchange between defense counsel and the prosecutor regarding the Batson issue. We can only conclude that the trial judge found that the defendant had failed to prove the prima facie case under Batson at the previous sidebar conference...."

Prosecutors' reasons were race neutral. (Harrell II, Appendix "B")

On remand, the Trial Court on hearing nothing but what had been presented at the time of trial and without explanation, found that a prima facie case of racial discrimination had been made out. (R.R.Tr.p. 6)

There then followed a remarkably nasty confrontation between the Defense Attorney and Assistant District Attorney Herman Y. Thomas. Mr. Thomas insisted that the black venirepersons excused by the State had been struck because they came from neighborhoods where there were serious drug problems. The Defense Attorney insisted that this was a pretext to cover up racially discriminatory strikes by Mr. Thomas.[6] In support of

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[6]Ironically, Mr. Thomas is black.

his position the Defense Attorney did not dispute the proposition that the veniremen in question came from such neighborhoods, but pointed to a venirewoman of unspecified race, who was not struck and who had the same zip code as a black venireperson who was struck. Mr. Thomas pointed out that zip codes do not follow neighborhoods. And so on. (R.R.Tr.pp. 3-14) On January 17, 1990, the Trial Judge issued an order finding that the State had not advanced race neutral reasons for its strikes. (R.R. p. 7; Appendix "C")

On April 27, 1990, the Court of Criminal Appeals, on the basis of the return from remandment, reversed Respondent Harrell's conviction, again without mentioning prima facie case or substantial under-representation. (Harrell v. State, ___ So.2d ___ [Ala. Crim. App, April 27, 1990]; Appendix "D",

hereinafter, Harrell III) The State applied for rehearing, but the same was overruled on June 29, 1990. (Ibid)

The State petitioned for certiorari review, arguing that a finding of racial discrimination where there was no substantial under-representation is clearly wrong. The Alabama Supreme Court granted review, but on November 30, 1990, quashed the writ as improvidently granted. However, in so doing the Supreme Court found facts showing that there was no substantial under-representation. (Harrell v. State, ___ So.2d ___ [Ala, Nov. 30, 1990]; Appendix "E"; hereinafter Harrell IV)

STATEMENT OF THE FACTS

The facts relating to Respondent Harrell's crime are of little direct relevance to the issue here presented.

Those facts are adequately set out in the opinions in Harrell I and II; 555 So.2d 257, 259-60; Appendix "A", pages 6-9 and 555 So.2d 263, 264, Appendix "B", pages 22-24, respectively. We submit these for the information of this Honorable Court.

The facts on which this petition is based are undisputed and were found by both state appellate courts. As stated by the Alabama Supreme Court in Harrell IV, they are:

> "...1) The lawfully established venire consisted of 28 people, of whom 10 (35.7%) were black; 2) the prosecutor used 5 of her 8 peremptory challenges to strike blacks and the remaining 3 to strike whites; 3) defense counsel used all 8 of his peremptory challenges to strike whites from the venire; and 4) the jury that was ultimately empanelled consisted of 5 blacks, amounting to 41.7% of the jury (a greater percentage than was on the lawfully established venire), and 7 whites...." (Harrell IV; Appendix "E", page 48)

According to the 1980 census for Mobile County, Alabama, 31.5% of the population of that county is black. (Bureau of the Census 1980, General Population Characteristics, Vol 1, part 2, Alabama, P.C. 80-1-B2, pages 2-11 and 16.)

SUMMARY OF THE ARGUMENT

1. The confusion evidenced by the Alabama courts in this case results from the reading of a single passage of Batson v. Kentucky, (476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 [1986]), out of the context of the whole opinion and the case in which it arose. The language of Batson and the authorities relied on clearly demonstrate an intent to extend to petit jury selection procedures the standards previously established for grand juries and venires. Substantial under-representation, contrary to the ruling of the Alabama Supreme

Court, is a well established essential element of racial discrimination under such standards.

2. Numerous state supreme and appellate court cases have found the intentional inclusion by a prosecutor of members of the relevant minority to be of strong or conclusive significance to the question of prima facie case of racial discrimination. The Alabama Supreme Court ruled to the contrary in these authorities.

3. The constitutional policy of equal protection requires that substantial under-representation be an element of a prima facie case of racial discrimination, because:

(A) The lack of substantial under-representation demonstrates a lack of discriminatory intent.

(B) Without substantial under-representation there is no basis for a

claim of a denial of equal protection.

(C) It would be a denial of equal protection to visit the burdens of compulsory jury service disproportionately on racial minorities.

(D) Prosecutors should be encouraged to, not discouraged from, striking juries in which racial minorities are not substantially under-represented.

(E) The Batson rule as it has been implemented in Alabama requires the interjection of race as an issue in every case involving a minority defendant, and, in so doing, the Batson decision, as implemented in Alabama, exacerbates racial prejudice.

ARGUMENT

REASONS FOR GRANTING THE WRIT:

I.

CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT

One point made by the Alabama Supreme Court in Harrell II must be conceded: "...There has been a great amount of confusion over the interpretation to be given Batson...." (555 So.2d 263, 265; Appendix "B", page 28) The confusion of the Alabama courts is clearly revealed by their actions in this case: The Trial Judge, on the basis of his observations in the courtroom, first found that the Batson objection did not even merit discussion and rejected it without considering the objection. Then, on remandment, the Trial Judge on the same evidentiary basis found that a prima facie case had been made out. The Court of Criminal Appeals of Alabama never mentioned

prima facie case in either of its opinions. The Alabama Supreme Court, although expressly recognizing the importance of prima facie case, seems to think that one is made out, if a scintilla of evidence can be found which suggests the possibility of discriminatory intent, even if there is strong evidence demonstrating the contrary.

Thus, in Harrell IV, the Alabama Supreme Court, after expressly finding facts demonstrating that there was no substantial under-representation of black people on the Respondent's jury, proceeded to approve the Trial court's finding of members of the Respondent's race. The Court reached this conclusion by ignoring facts clearly demonstrating a lack of discriminatory intent (e.g. the fact that the prosecution struck substantial numbers of both black and white venirepersons and

the fact that the prosecution accepted a jury with nearly half of its members being of the Respondent's race) and giving controlling weight to very questionable factors,[7] which it thought indicated a discrimin- atory intent. The confusion evidenced in this case comes from reading a single passage of the Batson opinion out of the context of the whole opinion and out of the context in which Batson arose. That passage reads:

> "To establish such a [prima facie] case, the defendant first must show that he is a member of a cognizable racial group, Castaneda v. Partida, supra, at 494, 51 L.Ed.2d 498, 97 S.Ct. 1272, and that the prosecutor has exercised peremptory challenges to remove from the venire members

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[7]We will not burden the Court with analysis of these factors here, but we do submit such analysis in Appendix "H" to this petition.

> of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Avery v. Georgia, 345 U.S., at 562, 97 L.Ed. 1244, 73 S.Ct. 891. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination...." (Batson v. Kentucky, 476 U.S. 79, 96, 90 L.Ed.2d 69, 87-88)

Compare Harrell II, 555 So.2d 263, 265-264; Appendix "B", pages 29-30. This passage does not mention substantial under-representation, and the Alabama Supreme Court has taken the position that such is not an element of racial discrimination under Batson.

However, the quoted passage, above, does make reference to "...the selection of the venire...." And, immediately before the quoted passage there appears the following:

> "...The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. See Castaneda v. Partida, supra, at 494-495, 51 L.Ed.2d 498, 97 S.Ct. 1272; Washington v. Davis, 426 U.S., at 241-242, 48 L.Ed.2d 597, 96 S.Ct. 2040; Alexander v. Louisiana, supra, at 629-631, 31 L.Ed.2d 536, 92 S.Ct. 1221. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial...." (Batson, 476 U.S. 79, 96, 90 L.Ed.2d 69, 87)

Castaneda v. Partida (430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 [1977]) and Alexander v. Louisiana (405 U.S. 625, 31

L.Ed.2d 536, 92 S.Ct. 1221 [1972]) related to grand jury selection procedures. The reference to these cases and to "...the selection of the venire...." in the context of prima facie case in Batson, clearly demonstrate that this Court did not intend to create a new concept of racial discrimination in Batson but to extend to petit jury selections the standards already established for grand juries and venires. Castaneda, Alexander, and Washington v. Davis (426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 [1976]) all involved substantial under-representation.

Alexander v. Louisiana, above, involved a grand jury selection process by which prospective jurors were put through several screenings. In Alexander's case the percentage of prospective grand jurors who were black went down markedly at each screening, with the result that, although

21% of the presumptively qualified persons in the county were black, no black person sat on the grand jury which indicted Alexander.[8] On these facts, this Court found that Alexander had made out a prima facie case of discrimination. In Castaneda v. Partida, above, although 79.1% of the county was of hispanic origin, the grand juries included only between 39% and 50% of persons of such origin. (430 U.S. 482, 485-488, 51 L.Ed.2d 498, 505-506). This Court found a prima facie case of racial discrimination, observing:

> "...[S]ubstantial under-representation of the group constitutes a constitutional violation as well [as total exclusion], if it results from purposeful discrimination...." (430 U.S. 482, 493, 51 L.Ed.2d 498, 509; emphasis supplied)

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[8]This pattern is precisely reversed in this case.

In Washington v. Davis (426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 [1976]), although the evidence showed under-representation of the group, this Court rejected the claim of discrimination, because there was no purposeful discrimination. (426 U.S. 299, 238ff, 48 L.Ed.2d 597, 606ff).

In Batson, the prosecutor used his peremptory challenges to strike all of the black venirepersons from the jury, with the result that an all white jury sat on the case. In this case, the lawfully established venire of 28 persons included 10 (35.7%) who were black. The prosecution used its peremptory strikes to excuse about equal numbers of black and white venirepersons, while the defense struck whites exclusively. The resulting jury consisted of 5 (41.7%) black jurors and 7 white jurors. Notwithstanding the

fact that the representation of black persons on the jury was significantly higher than their representation on the venire, the Alabama courts found that a prima facie racial discrimination by the prosecution had been made out. In reaching this conclusion, no Alabama court ever addressed the question of substantial under-representation. In Batson and all of its other cases on racial discrimination, this Honorable Court has held substantial under-representation to be an essential element in racial discrimination. The decision and opinion of the Alabama Supreme Court is in irreconcilable conflict with said opinions. For this reasons, the writ should issue in this cause to review the decision and opinion of the Supreme Court of Alabama.

II.

CONFLICT AMONG THE JURISDICTIONS

The weight of authority among the jurisdictions is that no prima facie case of racial discrimination is made out under Batson, if the prosecution does "...not attempt to exclude all... [of the relevant group], or as many... [of the relevant group] as it could, from the jury...." United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986); cert den. 481 U.S. 1037, 95 L.Ed.2d 814, 107 S.Ct. 1973. People v. Evans, 125 Ill.2d 50, 530 N.E.2d 1360, 1365 (1988); cert. den. ___ U.S. ___, 104 L.Ed.2d 1036, 109 S.Ct. 3175; People v. Holman, 132 Ill.2d 128, 547 N.E.2d 124, 144ff (1989); cert. den. ___ U.S. ___, 111 L.Ed.2d 804, 110 S.Ct. 3296; Phillips v. State, 496 N.E.2d 87, 89 (Ind. 1986); State v. Elem, 747 S.W.2d 772, 775 (Mo.

App, 1988); Clay v. State, 290 Ark. 54, 716 S.W.2d 751, 754ff (1986); State v. Peck, 719 S.W.2d 553, 555ff (Tenn. Crim. App, 1986); rev. den.: Mincey v. State, 257 Ga. 500, 360 S.E.2d 578, 581 (1987); Horton v. State, 194 Ga. App. 797, 392 S.E.2d 259 (1990); cert. den; State v. Simms, 505 So.2d 981, 985 (La. App, 3rd Cir, 1987); State v. Moore, 490 So.2d 556, 558ff (La. App, 4th Cir, 1986); State v. Allen, 323 N.C. 208, 372 S.E..2d 855, 861ff (1988); State v. Abbott, 320 N.C. 475, 358 S.E.2d 578, 581 (1987); State v. McNeil, 99 N.C. App. 123, 393 S.E.2d 123, 126 (1990); State v. Smith, 293 S.C. 22, 358 S.E.2d 389, 390 (1987). These states consider a prosecutor's intentionally leaving members of the relevant racial minority on the jury as strong, even conclusive evidence, that he or she had no discriminatory intent. Obviously, this is

especially so where the prosecutor intentionally leaves substantial numbers of such persons on the jury. See also United States v. Porter, 831 F.2d 760, 767 (8th Cir. 1987); cert. den. 484 U.S. 1069, 98 L.Ed.2d 1001, 108 S.Ct. 1037; United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) and United States v. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990). The rational basis of these cases is that Batson does not forbid the striking of minority veniremen so long as they are not struck solely because of race. If a prosecutor intentionally eschews an opportunity to strike a person of a certain race, it is strong evidence of a lack of interest in discriminating against that person's race.

Obviously, the decision and opinion of the Alabama Supreme Court cannot be reconciled with these decisions. Here,

the prosecution did not merely leave a black person or some black people on the jury, but intentionally struck so that almost half the jury was of the Respondent's race. Yet, the Alabama Supreme Court treated this fact as of little relevance.

The writ should issue to resolve the conflicts and confusion over this issue.

III.

THE CONSTITUTIONAL POLICY OF EQUAL PROTECTION MANDATES SUBSTANTIAL UNDER-REPRESENTATION AS AN ESSENTIAL ELEMENT OF RACIAL DISCRIMINATION.

The purpose of the decision in Batson v. Kentucky (476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 [1986]) is to promote the constitutional policy of equal protection. Obviously, if that decision is applied in a manner which promotes

unequal protection, it is being perverted. Such is the case in Alabama at the present time, as a result of ignoring the significance of substantial under-representation.

First, it must be observed that, although it may be theoretically possible for a person to desire to practice racial discrimination against some members of a racial group and not others, the racial discrimination condemned by the Fourteenth Amendment is that grounded on the assumption that all members of the group share characteristics which make them particularly qualified or unqualified for

some purpose.[9] Such prejudice leads to the exclusion of all or as many as possible of the relevant minority. Therefore, the voluntary acceptance of a substantial number of members of such minority is conclusive proof of the lack

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[9]"...[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race. ... Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors ... so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black...." (Batson, 476 U.S. 79, 97, 90 L.Ed.2d 69, 88)

of discriminatory intent, which is the other element of a prima facie case of racial discrimination. Washington v. Davis, above; Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977).

Second, without substantial under-representation, there is no basis for a claim that there has been a denial of equal protection.

Third, if substantial under-representation is not an essential element of racial discrimination, prosecutors, desirous of avoiding litigation, would be tempted to discriminate in favor of minorities. In addition to being simply another form of racial discrimination, such discrimination in the case of civic duties like compulsory jury duty would visit a disparate burden on the minorities so "favored".

Fourth, since juries which do not reflect substantial under-representation are, on their face, consistent with equal protection, prosecutors should be encouraged to strike such juries. In the area of the Fourth Amendment, this Honorable Court has long condemned warrant review policies which would have the effect of discouraging resort to a warrant. E.g. United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 689, 85 S.Ct. 741 (1965). This policy is based on the Fourth Amendment's preference for warrants. As things stand now in Alabama, the prosecutor, who strikes all members of a relevant minority, and the prosecutor who avoids such strikes in so far as possible, both face the same threat of Batson litigation at trial and on appeal and, under the instant case, the same threat of Batson sanctions. Prosecutors

faced with defense attorneys, who invariably strike along racial lines, ought to be given some practical encouragement for resisting the temptation to reply in kind.

Fifth, although prejudice, being a belief, opinion or feeling, is not per se unconstitutional, it stands at the base of the bulk of our equal protection problems. Surely, racial prejudice is not something which ought to be encouraged. Yet, that is precisely what the present administration of the Batson Rule in Alabama threatens. This is primarily because the Alabama Supreme Court's efforts to "clarify" Batson (E.g. Ex parte Branch, 526 So.2d 609 [Ala. 1987] and Harrell II and IV, Appendices "B" and "D") have left Alabama trial judges, defense attorneys, and prosecutors with no idea of what is a prima facie case under Batson.

except that it includes the striking by the prosecutor of a member of the accused's race. Thus, when that situation presents itself, defense attorneys feel obliged to make a Batson objection. Indeed, the Alabama Supreme Court has recently held the failure to make a Batson objection, when a prima facie case is presented, constitutes ineffective assistance of counsel of the same category as denial of counsel, so that prejudice is conclusively presumed. Ex parte Yelder, ___ So.2d ___ (Ala, Jan. 11, 1991); Appendix "I". Trial judges, in ruling on Batson objections, usually simply automatically direct the prosecutor to state his or her reasons for their strikes. Then, no matter what the reasons are, the defense must make a pro forma, claim that the reasons advanced are shams. The result of all this, beyond the gross waste of time and resources, is the

introduction of race into every case in which there is a minority defendant.

The instant case is a perfect example of how this works in practice: This is a simple drug case. The victims, society, are of all races; the prosecutors were black and white; the State's witnesses included blacks and whites; the jury was five black and seven white persons; the defendant was black but could have been of any race. Race was not an issue in this case and never would have been injected but for the Alabama implementation of Batson. In more than three years of litigation the non-issue of race has been the overbearing issue. The gratuitous interjection of racial issues into race neutral situations can only introduce prejudice where there was none and exacerbate any prejudice there is. Thus, Batson, a decision aimed at

eliminating the effects of prejudice, may well be generating prejudice in Alabama.

For all of these reasons, this Honorable Court should grant review in this case and clarify the significance of substantial under-representation in a prima case under Batson.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided an important question under the Fourteenth Amendment in a manner which conflicts sharply with the teachings of this Honorable Court as well as the holdings of other jurisdictions which have addressed this issue. In addition, the policy established by the Alabama Supreme Court is destructive of the purposes of the policy established by this Court.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions of the said Appellate Courts of Alabama.

Respectfully submitted,

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BY:

_____
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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of February, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Joe Louis Harrell, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

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